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FILED
APR 1 1992
OFFICE OF THE CLERK

No. 91-1075

In the Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE LEWIS BAILES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly held that an amendment to the penalty provisions of the National Housing Act applied retroactively.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. AII-AXIX, is reported at 942 F.2d 1555. The pertinent opinion, Pet. App. CXXV-CXXIX, and order of the district court, Pet. App. CXXIII-CXXIV, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1991. A petition for rehearing was denied on December 6, 1991. Pet. App. BXX-BXXII. The petition for a writ of certiorari was filed on December 26, 1991.* The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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* The caption was subsequently corrected. The Solicitor General received notice of the correction on January 9, 1992.

STATEMENT

1. Peppertree Apartments, City Court II Apartments, Rainbow Apartments, and College Manor Apartments are multifamily housing projects located in Alabama. Each project was built with a loan insured against default by the Department of Housing and Urban Development (HUD) under 12 U.S.C. 1715*l*(b) (1988). Petitioner George Bailes is a managing or general partner in each of the entities that own the projects. At all relevant times, Bailes Realty Company, of which petitioner is the sole owner, was the managing agent for each of the projects. Pet. App. AIII-AIV.

In consideration for HUD's mortgage insurance, each of the housing projects entered into a regulatory agreement with HUD. Each of the agreements is identical. In part, the agreements prohibit project owners from using project income or other assets for any purpose other than "reasonable operating expenses and necessary repairs" without HUD's prior written approval. The agreements provide that in case of violations of the agreement HUD may sue in state or federal court to enforce the agreement or for other relief. Pet. App. AIV-AV.

After determining that petitioner had made expenditures in violation of the regulatory agreements, HUD sought petitioner's debarment from participation in HUD programs for a five-year period. Pet. App. AV. A hearing was conducted by an administrative judge of HUD's Board of Contract Appeals. The administrative judge found that petitioner had diverted project assets to his money market accounts in the amount of $1,519,711; that, after an audit by HUD's Office of Inspector General, petitioner had returned $1,414,800; and that after the administrative proceeding petitioner returned an additional $14,600. Pet. App. CXXVII & n.1. The

administrative judge further found that petitioner had made improper distributions of $90,311 in project funds to his money market accounts, and that petitioner did not replace this amount despite knowing that the distributions violated the regulatory agreements. Pet. App. CXXVII. Accordingly, petitioner was debarred from participation in HUD programs for five years. Pet. App. AV-AVI.

Petitioner was also subject to other sanctions. Originally, when petitioner had engaged in the conduct for which he was debarred, the Secretary was authorized to seek fines up to $5000 for each "willful" violation and up to three years imprisonment, or both. See 12 U.S.C. 1715z-4(b) (1982). *In addition*, as petitioner conceded below, Pet. C.A. Opening Br. 34, the Secretary could have supplemented the statutory remedies with a suit for compensatory damages for breach of the regulatory agreement. In 1988, however, three years after petitioner's violations of the regulatory agreement, Congress substituted a liquidated damages remedy for the criminal sanctions allowable under the prior statute. In place of the latter, Congress provided for recovery of "double damages" calculated on the basis of a specific formula consisting of "double the value of the assets and income of the project that the court determines to have been used in violation of the regulatory agreement or any applicable regulation" plus certain specified costs. 12 U.S.C. 1715z-4a(c) (1988).

2. In 1989, the United States filed suit in the district court, seeking to recover the statutory damages under the 1987 law—*i.e.*, twice $90,311, or $180,622. The district court granted the government's motion for summary judgment and awarded the government the statutory damages and costs as requested. Petitioner sought reconsideration of the statutory award, arguing that, because Section 1715z-4a(c) had been enacted after

petitioner's conduct had occurred, the statutory damages remedy should not be applied retroactively. Pet. App. DXXI-DXXXII.

The district court rejected petitioner's argument, Pet. App. DXXXI-DXXXIV, and the court of appeals affirmed, Pet. App. AII-AXIX. Applying the retroactivity analysis set forth in *Bradley* v. *School Board*, 416 U.S. 696 (1974), the court held that it would not be a "manifest injustice" to apply Section 1715z-4a(c) to petitioner's case. Pet. App. AXV-AXIX.

DISCUSSION

The United States has determined not to pursue its claim for relief for "double damages" under the new statute. Instead, the government will seek compensatory damages under a contract theory based on the regulatory agreement signed by the petitioner and the government before the new statute was signed into law. Because the government is no longer seeking relief under the new statute, that claim for relief—which is the sole basis for the petition for a writ of certiorari—is moot. See, *e.g.*, *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 512-513 (1989); *Frank* v. *Minnesota Newspaper Ass'n*, 490 U.S. 225, 227 (1989). Accordingly, this Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals, directing the court of appeals to remand the case to the district court with directions (i) to vacate with prejudice only that aspect of the district court's award that represents the "doubling" of damages and (ii) to allow the government to seek additional recovery pursuant to its other claims for relief. See *Webster*, 492 U.S. at 512-513; *Frank*, 490 U.S. at 227.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings as set forth above.

Respectfully submitted.

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APRIL 1992